

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 19, 2015

v

JERMAINE LATWONE HAYNES, also known as
TONY KENDRICK,

No. 320409
Wayne Circuit Court
LC No. 13-008812-FC

Defendant-Appellant.

Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence presented at trial for a rational jury to find him guilty of assault with intent to commit murder beyond a reasonable doubt. We disagree.

This Court reviews de novo a defendant’s challenge to the sufficiency of the evidence. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements proved beyond a reasonable doubt. *Id.* at 175.

Under MCL 750.83, there are three elements of assault with intent to commit murder: “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (internal quotation marks and citation omitted). On appeal, defendant only claims that the evidence did not establish he had an actual intent to kill.

Circumstantial evidence and reasonable inferences arising from the evidence can provide sufficient evidence to establish the elements of a crime. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). “This Court has consistently observed that [b]ecause of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.”

Ericksen, 288 Mich App at 196-197 (internal quotation marks and citation omitted; alteration in original). An intent to kill can be inferred from the use of a dangerous weapon. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997) (opinion by RILEY, J.). Additionally, in determining whether a defendant had an intent to kill, the jury may consider:

the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985) (internal quotation marks and citation omitted).]

The testimony presented at trial included that defendant approached David Owusu before the shooting and made a statement along the lines of: "I want you and your friend to leave off the block or I'm gon' shoot the both of ya'll," "Get off the street or I'm gon' pop you and your friend," or "If you and him don't get off our block, I'm gon' pop both of ya'll." The testimony also indicated that, shortly after defendant verbalized the threat, defendant fired multiple gunshots at Owusu and Malik Atkins using a black semi-automatic handgun while they were riding their bikes down the street. Given that "minimal circumstantial evidence [was] sufficient" to establish defendant's state of mind, *Ericksen*, 288 Mich App at 196-197, defendant's statement of intent prior to the shooting and defendant's act of firing multiple gunshots at Owusu and Atkins as they rode away from defendant, provided sufficient circumstantial evidence from which the jury could infer an actual intent to kill. Although defendant's recollection of the incident differed from Owusu's and Atkins's accounts, and aspects of Owusu's testimony conflicted with his previous statements, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses," *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008), and "all conflicts in the evidence must be resolved in favor of the prosecution," *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Thus, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence presented at trial for a reasonable jury to conclude beyond a reasonable doubt that defendant fired the gun at Owusu and Atkins with an intent to kill.

II. PROSECUTORIAL ERROR

Next, defendant argues that his rights to a fair trial and due process were violated by the prosecutor's comments indicating that she was proud of Owusu and Atkins and the testimony they provided at trial. We disagree.

A defendant must contemporaneously object and request a curative instruction to preserve a claim of prosecutorial misconduct. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Accordingly, "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant did not object when the prosecutor commented on Owusu's and Atkins's testimony during her closing argument, so this issue is not preserved for appeal. We review unpreserved issues of prosecutorial misconduct for

plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor stated the following during her closing argument:

If you listened to the testimony of David Owusu and Malik Atkins, it was just as consistent as two people would be. Okay. They would be similar enough but different enough because each of us have a different perspective. They were located in different places. They didn't add. They didn't embellish. They just testified simply to what they saw.

Frankly, I'm very proud of David Owusu and Malik Atkins. I'm very proud of their conduct on August 22nd. I was very proud of their testimony, but that they came here without fear. People have fear and won't come forth. They told you we were a bit nervous. They were honest, a bit nervous[,] but they told truthfully what they saw and what they heard on that day.

"[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *Bennett*, 290 Mich App at 475. A "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id.* at 476. However, "[p]rosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Id.* Additionally, "prosecutorial arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief." *Unger*, 278 Mich App at 240. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

In light of defendant's conflicting account of the incident, it is evident that the outcome of this case depended on whether the jury believed Owusu's and Atkins's testimony or defendant's testimony. Accordingly, the prosecutor was permitted to comment on Owusu's and Atkins's credibility during her closing argument. See *id.* Additionally, the prosecutor's statement did not imply that she had any special knowledge, outside of the evidence presented at trial, regarding Owusu's and Atkins's truthfulness. See *Bennett*, 290 Mich App at 476. Likewise, there is no indication that "the prosecutor put the prestige of the office behind a personal belief of a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 277 n 26; 531 NW2d 659 (1995). Thus, the prosecutor's comments were not improper and defendant's claim is without merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel based on eight instances of defense counsel's allegedly deficient performance. We disagree. Because this issue is raised for the first time on appeal, it is unpreserved and our review is for errors apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffectiveness of counsel, a defendant generally must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would be different. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). Defendant also carries the burden of establishing the factual basis of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). This Court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics employed while trying a case. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

A. FAILURE TO PRESENT EVIDENCE RELATED TO TEXT MESSAGES EXCHANGED WITH MELROSE WILLIAMS AND FREDERICK HAYNES

Defendant first argues that his counsel failed to investigate and present evidence related to text messages exchanged by Melrose Williams and defendant and Frederick Haynes and defendant, which would have indicated "that the victim and his friends were seeking out the [d]efendant with the intent to do him harm" and that defendant believed "that his life was in danger from the police."

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Choices "regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," *id.*, which is a defense that may have affected the outcome of the trial, *Chapo*, 283 Mich App at 371.

Defendant has failed to demonstrate that defense counsel was ineffective for failing to investigate or present text messages and related testimony from Williams regarding the young men's intent to harm defendant. There is no mention of Williams in the lower court record or any indication that defendant received text messages from Williams. Instead, defendant's own testimony at trial indicated: he did not know Owusu or Atkins before the day of the incident; he had an altercation with Adrian regarding a lawn mower and related name-calling the day before the incident; and he received phone calls from "a lot of people" after Atkins fired gunshots at him, which indicated that Adrian, Owusu, and Atkins "tried to set [him] up." When the prosecutor asked defendant on cross-examination who called him after the incident, defendant only stated that "[d]ifferent people that's [sic] on the block" called him and he could only identify "Tone" and "Shugey" by name, expressly stating that no one else came to mind.

Defendant filed an affidavit with his Standard 4 brief on appeal which indicates that he "informed [defense counsel] of the existence of several text-messages from one of the complainant's sister [sic], Mrs. Melrose Williams, in which [he] was warned that her brother was out with his friends seeking to do [him] and Anthony Gaskins harm[.]" Clearly then defendant's attorney was aware of that evidence and it must be presumed that it was not offered at trial for

strategic reasons which this Court will not second-guess. See *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009); *Dixon*, 263 Mich App 393. Thus, defendant has failed to establish the factual predicate of his claim. See *Hoag*, 460 Mich at 6.

And defense counsel was not ineffective for failing to obtain and present the text messages that defendant sent to Haynes regarding his fear of the police. It is not apparent from the lower court record that the text messages existed or that defendant made defense counsel aware of the text messages. As such, defendant has failed to establish the factual predicate of his claim. See *Hoag*, 460 Mich at 6. Moreover, even assuming that the text messages existed, there is no indication that failing to investigate or subpoena the text messages fell below an objective standard of reasonableness. See *Vaughn*, 491 Mich at 669. There is no indication that the content of the text messages provided a substantial defense to defendant's charges or were relevant to the theory of the case presented by the defense at trial. Additionally, as the prosecution argues on appeal, it appears unlikely that the text messages would have been admissible at trial given their irrelevance to the events that gave rise to defendant's charges, see MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), and "[f]ailing to advance a meritless argument . . . does not constitute ineffective assistance of counsel," *Ericksen*, 288 Mich App at 201.

B. FAILURE TO CALL ANTHONY GASKINS AND ESTELLE BURNETT AS WITNESSES

Next, defendant argues that his counsel was ineffective for failing to present Anthony Gaskins and Estelle Burnett as witnesses, both of whom would have helped the jury understand defendant's "state of mind" at the time of the incident. In his brief, defendant asserts that Gaskins would have testified regarding "the occurrences of the days leading up to the day of the confrontation," including that he was a recent victim of gun violence and had received the same text messages that defendant received from Williams. According to defendant, Burnett's testimony could have helped the jury to understand defendant's state of mind because her home was recently "the target of gunfire."

Similar to defendant's first claim, there is no mention of Gaskins or Burnett in the lower court record. But as defendant notes in his affidavit filed with his Standard 4 brief, he told his attorney about these two potential witnesses and their anticipated testimony. Thus, again, it must be presumed that this evidence was not offered at trial for strategic reasons which this Court will not second-guess. See *Payne*, 285 Mich App at 190; *Dixon*, 263 Mich App 393. Therefore, defendant has failed to establish the factual predicate of his claim. See *Hoag*, 460 Mich at 6.

However, even assuming, *arguendo*, that Gaskins and Burnett would have testified as defendant asserts, and that their testimony would have been relevant and admissible at trial, defense counsel's failure to call them as witnesses did not deprive defendant of a substantial defense. *Dixon*, 263 Mich App at 398. At trial, defendant testified to the events that occurred on the day of the incident and the day before the incident, and neither Gaskins nor Burnett were present when the shooting occurred. Further, defendant testified about his state of mind during the incident, indicating that he feared for his life when he heard the gunshots and that he was paranoid at the time of the incident. Accordingly, defense counsel's purported failure to call

Gaskins and Burnett as witnesses did not deprive defendant of a substantial defense and defense counsel's performance did not constitute ineffective assistance of counsel. See *id.*

C. FAILURE TO OBTAIN HOSPITAL RECORDS AND POLICE REPORTS

Next, defendant argues that his counsel was ineffective because he failed to obtain hospital records and police reports or other documents related to Gaskins's and Burnett's potential testimony. Defendant appears to argue that the hospital records related to Gaskins's leg injuries, which were "severe enough to warrant amputation of his leg," would have corroborated the reasons why defendant feared for his life. Defendant asserts that the police-related documents "could [have] introduced to the jury the fact that [defendant's] next door neighbor's house had been shot up because the perpetrators were under the impression that it was [defendant's] residence."

First, apart from defendant's assertions in his Standard 4 brief, defendant has failed to establish the existence of any hospital records and police reports containing the information that he describes on appeal, and there is no indication in the lower court record of such documentation. However, even if the documents exist, it is unlikely that they would have been admissible. Only relevant evidence is admissible. See MRE 402. The details of Gaskins's leg amputation and the details of the alleged shooting at the home of defendant's neighbor did not have any tendency to make more or less probable a fact of consequence to the action. See MRE 401. These documents were only, if at all, peripherally related to any of the events that gave rise to defendant's charges and could not provide any additional information regarding whether defendant fired a weapon at Owusu and Atkins or whether defendant had an actual intent to kill Owusu and Atkins during the incident. See *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009). Thus, defense counsel was not ineffective by failing to obtain and present the documents at trial.

D. FAILURE TO EFFECTIVELY IMPEACH OWUSU

Next, defendant argues that his counsel failed to effectively impeach Owusu. In his brief, defendant identifies four statements that defense counsel failed to utilize at trial in order to undermine Owusu's credibility. However, contrary to defendant's arguments, the lower court record indicates that defense counsel impeached Owusu's testimony with his prior inconsistent statements and emphasized the inconsistencies in Owusu's testimony during his closing argument. Therefore, defendant has failed to establish the factual predicate of his claim. See *Hoag*, 460 Mich at 6. Further, the record shows that defense counsel effectively impeached Owusu's testimony, but, despite defense counsel's efforts, the jury found Owusu's and Atkins's testimony to be more credible than defendant's testimony. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

E. FAILURE TO PRESENT SELF-DEFENSE THEORY

Next, defendant argues that his counsel was ineffective because he failed to ask defendant questions that would have revealed to the jury that he fired the gun in self-defense after Atkins

approached him with a handgun. Defendant attributes defense counsel's performance to a lack of preparation.

As stated above, defense counsel was "responsible for preparing, investigating, and presenting all substantial defenses." *Chapo*, 283 Mich App at 371. However, "[w]here there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Additionally, the decision to argue one defense over another is considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Even though defendant asserts that he informed defense counsel that he acted in self-defense, it is not evident from the lower court record that defendant actually notified defense counsel of this defense or that defense counsel failed to investigate a self-defense theory. More significantly, the presentation of a theory of self-defense would have been completely inconsistent with the testimony of Owusu, Atkins, and defendant. Owusu and Atkins both testified that Atkins was unarmed when the incident occurred and that defendant fired gunshots at them as they were riding away from the scene after defendant threatened Owusu. Even though defendant testified that Atkins was armed and approached defendant while reaching for a gun in his waistband, defendant never testified at trial that he was armed, that he needed to defend himself, or that he fired the weapon at Owusu and Atkins. Instead, defendant testified that he ran away when Atkins pulled the gun out of his waistband and hid in an abandoned house. Although defendant could have raised inconsistent defenses at trial, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), in order to demonstrate that defense counsel was ineffective, he must rebut the strong presumption that defense counsel's decision to defend defendant by repeatedly attacking the credibility of Owusu and Atkins and offering defendant's testimony as the accurate portrayal of the incident was "sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant has failed to demonstrate that a decision to forgo a theory of self-defense that was wholly inconsistent with defendant's testimony—and, in fact, would have effectively impeached defendant's testimony—was not sound trial strategy.

F. FAILURE TO REQUEST FELONIOUS ASSAULT INSTRUCTION

Next, defendant argues that his counsel was ineffective for failing to request a jury instruction on felonious assault. However, MCL 768.32(1) precludes a jury instruction on an uncharged lesser cognate offense. *People v Jones*, 497 Mich 155, 164; 860 NW2d 112 (2014). And felonious assault is a cognate lesser offense of assault with intent to commit murder. *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006). Accordingly, this claim is without merit.

G. FAILURE TO INTRODUCE MITIGATING CIRCUMSTANCES AT SENTENCING

Defendant also argues that his counsel was ineffective because he failed to introduce mitigating circumstances at his sentencing which may have resulted in a lesser sentence. This claim is without merit. Defendant provided a lengthy statement at sentencing, during which he explained his perspective on the incident, his belief that the young men were waiting to rob him, his concerns that his charges were intensified because of his "bad history with the police in [his] neighborhood," and his belief that the jury should have received a self-defense instruction. Thus,

he had ample opportunity to raise the “mitigating circumstances” that he references in his Standard 4 brief without the intercession of his attorney and has failed to establish that his attorney’s decision fell below an objective standard of reasonableness. See *Vaughn*, 491 Mich at 669-671.

H. FAILURE TO SEEK PSYCHOLOGICAL TESTING OR CHALLENGE DEFENDANT’S SANITY

Finally, defendant argues that his attorney was ineffective for failing to request that psychological testing be performed on him. Failing to investigate and present a meritorious insanity defense can constitute ineffective assistance of counsel. *People v Newton*, 179 Mich App 484, 491; 446 NW2d 487 (1989). However, even if this Court assumes that defendant was, in fact, diagnosed with the mental conditions mentioned in his Standard 4 brief, the record contains no evidence that defendant was affected by symptoms of those conditions at the time of the incident. Additionally, to the extent that defendant is arguing that he was entitled to an insanity defense, a defendant must show that he “lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law” in order to establish an affirmative defense of legal insanity. MCL 768.21a(1). “Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity.” MCL 768.21a(1); see also *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001). Consequently, defendant’s diagnoses of paranoid schizophrenia and PTSD would not have been sufficient to support a legal insanity defense. And there is no indication in the record that defendant’s purported mental illnesses prevented him from either appreciating the wrongful nature of his actions or conforming his conduct to the law under either version of the incident offered at trial. Accordingly, defendant has failed to establish that his counsel’s performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s errors, the result of the proceedings would be different. See *Lockett*, 295 Mich App at 187.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter